INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:	
Chapman v. *California*, 386 U.S. 18	12
Good v. *United States*, 378 F. 2d 934	8
Gouled v. *United States*, 255 U.S. 298	7
Hammer v. *United States*, 271 U.S. 620	13
Hoffa v. *United States*, 385 U.S. 293	7
Lewis v. *United States*, 385 U.S. 206	7
Lopez v. *United States*, 373 U.S. 427	7, 10
On Lee v. *United States*, 343 U.S. 747	7
United States v. *Johnson*, 337 F. 2d 180, affirmed, 383 U.S. 169	11
United States v. *Jones*, 433 F. 2d 1176, certiorari denied, 402 U.S. 950	8, 10
United States v. *Silva*, 449 F. 2d 145, certiorari denied, 405 U.S. 918	7–8
United States v. *United States District Court*, 407 U.S. 297	8–9
United States v. *White*, 401 U.S. 745	6, 7
United States v. *Wood*, 14 Pet. 430	13
Weiss v. *United States*, 308 U.S. 321	8
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579	8

517-311—73——1

Constitution and statutes:

	Page
United States Constitution:	
Article I, Section 6 (Speech or Debate Clause)	2, 3, 6, 9, 11
Fourth Amendment	2, 6, 7
18 U.S.C. 201	2
18 U.S.C. 203	2
18 U.S.C. 371	2
18 U.S.C. 1505	2
18 U.S.C. 1621	2
18 U.S.C. 1952	2

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1584

JOHN DOWDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on March 12, 1973. A petition for rehearing (Pet. App. C) was denied on April 27, 1973. The petition for a writ of certiorari was filed on May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights or the doctrine of separation of powers was violated when a government informer, who had consented to the placement on his person of a tape recorder, obtained oral admissions from petitioner during a meeting in petitioner's congressional office.

2. Whether petitioner's convictions on three perjury counts, which did not depend on evidence of legislative acts, were tainted by the admission at trial of evidence relating to other counts of the indictment, which allegedly concerned legislative acts protected from judicial inquiry under the Speech or Debate Clause of the Constitution.

3. Whether the government's evidence failed to satisfy a "two-witness" rule applicable to perjury prosecutions.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner, then a member of the United States House of Representatives from Texas, was convicted on eight counts of an indictment charging him with conspiracy to accept unlawful compensation, in violation of 18 U.S.C. 203 and 371 (Count I); conspiracy to obstruct a proceeding pending before the Department of Justice, in violation of 18 U.S.C. 1505 and 371 (Count II); unlawful travel in interstate commerce in order to facilitate bribery, in violation of 18 U.S.C. 201 and 1952 (Count III); and perjury, in violation of 18 U.S.C. 1621 (Counts IV-

VIII).[1] Petitioner was sentenced to prison terms, concurrent in part and consecutive in part, aggregating eighteen months, and fined a total of $25,000. The court of appeals reversed the convictions on Counts I–V, holding that proof of these counts had depended on evidence of legislative acts protected from judicial inquiry by the Speech or Debate Clause of the Constitution, Article I, Section 6 (Pet. App. B, pp. 10a–22a). This left in effect concurrent six-month sentences on Counts VI, VII, and VIII, plus a fine of $1,000 on each count. The United States has petitioned for a writ of certiorari to review the portion of the decision of the court of appeals reversing the convictions on Counts I–V (No. 72–1529, filed May 11, 1973).

The relevant facts, as established at trial and set forth in the opinion of the court below (Pet. App. B, pp. 5a–10a, 24a–25a), are as follows:

In 1965, the Investigations Subcommittee of the House Committee on the District of Columbia, of which petitioner was Chairman, had conducted investigations of urban renewal within the District of Columbia. The Monarch Construction Corporation was at that time under investigation by various federal and local agencies in connection with home improvement frauds. The president of Monarch, Nathan Cohen, sought petitioner's assistance in preventing a prosecution. Petitioner agreed to accept $25,000 to "handle" the matter. Thereafter, on September 22, 1965, petitioner and Cohen's sales manager, Myrvin

[1] A co-defendant, Myrvin C. Clark, charged in Counts I–III, pleaded guilty to Count III and was sentenced to five years' probation.

Clark, traveled separately to the Atlanta, Georgia, airport, where Clark handed petitioner an attache case containing $25,000 in cash. Petitioner subsequently met with Justice Department officials on Cohen's behalf, later explaining to Clark that "it was all taken care of" (Pet. App. B, pp. 8a–9a). When Monarch was again under grand jury scrutiny in 1967, Cohen and Clark offered petitioner $5,000 more to avoid prosecution. Petitioner referred Cohen to an attorney who agreed to "fix" the case for $30,000, and petitioner met with the attorney and the prosecutor at Cohen's request.

In 1969, Cohen became the subject of an investigation in Maryland on unrelated charges. In exchange for immunity, he disclosed to the United States Attorney his dealings with petitioner and agreed to cooperate with law enforcement agents. Cohen consented to allow the FBI to monitor his telephone conversations with petitioner, and he permitted a recording device to be placed on his person to record the conversation during a meeting with petitioner. The government had also obtained court orders authorizing the use of electronic devices to intercept and record these conversations. During a meeting in petitioner's office on January 20, 1970, Cohen encouraged petitioner to discuss their previous dealings. Petitioner told Cohen that he [Cohen] would have been prosecuted except for petitioner's efforts, that Cohen's $25,000 payment had "done its job," and that petitioner had interceded with the Department of Justice on Cohen's behalf (Pet. App. B, pp. 10a, 24a–25a).

On February 20, 1970, the United States Attorney for the District of Maryland wrote petitioner a letter advising him that a special grand jury was investigating possible bribery, obstruction of justice, and conspiracy by petitioner and others in relation to the affairs of the Monarch Construction Corporation. The letter invited petitioner to appear before the grand jury (Transcript of March 4, 1970, pp. 4–6).[2] Petitioner accepted the invitation and attended a grand jury session on March 4, 1970. He was warned against the consequences of perjury (*id.* at 8). In response to questions, he denied having met Clark at the Atlanta airport in September 1965 and having received $25,000 from Clark. These denials formed the basis for perjury Counts IV and V of the indictment. Petitioner also denied having told Cohen or having been a party to statements to the effect that he [petitioner] had helped Cohen avoid prosecution, that he had received $25,000 and that the payment had "done its job," or that he had interceded with the Department of Justice on Cohen's behalf (*id.* at 80–83). These denials, which were flatly contradicted by the tape recording of January 20, 1970, were assigned as perjury in Counts VI–VIII.

The court of appeals reversed petitioner's convictions for conspiracy and for unlawful travel to facilitate bribery (Counts I–III), holding that proof of those charges had depended in part on evidence of legislative acts protected from judicial inquiry under

[2] We are lodging a copy of the transcript of the grand jury proceedings with the Clerk.

the Speech or Debate Clause. Perjury Counts IV and V (the denials that petitioner had met Clark and had received $25,000) were also reversed on the ground that the jury might have considered evidence of legislative acts in reaching their verdict on those charges as well (Pet. App. B, p. 22a). The court of appeals held, however, that Counts VI–VIII "stand on a different footing. * * * The sharp juxtaposition of defendant's baldly conflicting statements after he had been given every opportunity before the grand jury to tell the truth not only proved willfulness, but made slight the possibility that the jury had resort to the erroneously admitted evidence of legislative acts" (Pet. App. B, pp. 22a–23a). Convictions on these remaining counts were therefore affirmed.

ARGUMENT

1. Petitioner contends that the use of an informer to obtain incriminating statements from a member of Congress violated the Fourth Amendment and the concept of the separation of powers, and that such tactics represent overzealous law enforcement. These claims are without merit.

a. Petitioner contends that the government was responsible for an unlawful intrusion, in violation of the Fourth Amendment, when Nathan Cohen met with petitioner in the latter's congressional office suite, equipped with an electronic device to record their conversation. The court of appeals, relying on *United States* v. *White,* 401 U.S. 745, correctly rejected this argument. *White* reiterated this Court's long-standing position that the use of informants is a proper law

nforcement technique, and held that there is no distinc-on in terms of Fourth Amendment protection be-ween an informant who uses electronic devices to ansmit or record his conversations with the suspect nd one who does not. *United States* v. *White, supra,* 01 U.S. at 752–753; *Lopez* v. *United States,* 373 U.S. 27, 438. See also *On Lee* v. *United States,* 343 U.S. 47, 756.

It is clear also that petitioner was not relying, as e implies (Pet. 10), on the "sanctity" of his congres-ional office, but on his misplaced confidence that his dmissions to Cohen would not be revealed to the author-ies. Such reliance is not protected by the Fourth mendment. *Hoffa* v. *United States,* 385 U.S. 293, 02; *Lewis* v. *United States,* 385 U.S. 206, 210–211. Cohen's presence in petitioner's office was neither fur-ive nor uninvited. He in no way invaded petitioner's rivacy.[3] Cohen took nothing from petitioner's office xcept a permanent record of statements that peti-ioner had knowingly made to him during their meet-ng. *Lopez* v. *United States, supra,* 373 U.S. at 438. Petitioner was subject to the risk that the person in whom he confided regarding his illegal activities might e acting in cooperation with a law enforcement agen-y. *United States* v. *White, supra,* 401 U.S. at 752. Nor, as the court of appeals noted (Pet. App. B, p. 5a), was Cohen's consent to the tape recording viti-ted by the fact that he anticipated immunity from rosecution as a result of his cooperation with the Jnited States Attorney. *United States* v. *Silva,* 449

[3] Compare *Gouled* v. *United States,* 255 U.S. 298.

F. 2d 145, 146 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176, 1180-1181 (C.A. D.C.), certiorari denied, 402 U.S. 950; *Good* v. *United States*, 378 F. 2d 934, 936 (C.A. 9).

Petitioner's reliance on *Weiss* v. *United States*, 308 U.S. 321, is wholly misplaced. In *Weiss*, a telephone conversation was electronically intercepted, and the contents were transcribed and divulged to government agents and prosecutors without the knowledge or consent of either party, in apparent contravention of Section 605 of the Communications Act of 1934, 48 Stat. 1064, 1103. Thereafter, some of the suspects were confronted with this evidence, which persuaded them to plead guilty, consent to the use of the transcripts, and testify for the government. The Court rejected this bootstrap method of obtaining consent to divulge an intercepted conversation. In the instant case, however, Cohen's cooperation with the authorities resulted from his knowledge that the government had independent evidence of his wrongdoing. His consent was obtained before the recorded conversation took place. There was, moreover, no violation of the Communications Act.

b. Petitioner argues (Pet. 10) that the principle of separation of powers is transgressed when an agency of the executive branch of the government causes the electronic recording of a legislator's conversation with a United States citizen. As the court of appeals noted, no legal authority supports this unique proposition (Pet. App. B, p. 26a).[4] In *United States* v. *United*

[4] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593-594 (Frankfurter, J., concurring), which concerns the seizure of a steel mill, has no bearing on this question.

States District Court, 407 U.S. 297, cited by petitioner, this Court decided the narrow question whether the executive branch may conduct nonconsensual electronic surveillance without judicial approval when it believes there is a domestic threat to national security. That decision is wholly unrelated to any issue presented by the instant case. Here, the recordings were made with the consent of a party to the conversation, and prior judicial approval was sought and obtained as an extra precaution (Pet. App. B, pp. 24a–25a). Moreover, petitioner has failed to show why, as a member of Congress, he stands on a different footing from other citizens, when participating in activities not protected by the Speech or Debate Clause, insofar as investigative methods are concerned. Since legislators are subject to criminal penalties for offenses committed during their terms of office, there is no basis for concluding that they are immune from evidence-gathering techniques which have been approved by this Court.

c. Petitioner also contends (Pet. 11) that the government was guilty of "overzealous law enforcement" and that he was entrapped into perjuring himself before the grand jury. However, the investigative method used was in no way unscrupulous. The government had obtained Cohen's consent to the recording of his conversations with petitioner and had taken the extra precaution of obtaining a court order authorizing the use of electronic devices for this purpose. The object of such investigations is almost always to obtain and preserve incriminating statements by the suspect for

use in possible future prosecutions; there is no impropriety or "overzealousness" in this practice.

Nor was entrapment involved in the instant case. Undoubtedly, petitioner was encouraged by Cohen to make damaging admissions during their meeting on January 20, 1970. These admissions, however, were not themselves illegal acts, but rather references to acts previously committed by the petitioner—acts that the government had in no way encouraged. Prior to testifying before the grand jury, petitioner was carefully warned that he was under suspicion of corruption, and he was also warned against perjury (Transcript of March 4, 1970, pp. 4–6, 8). Thus, if the government encouraged him to do anything, it was to tell the truth. Petitioner perjured himself *despite* the government's precautions, not *because* of them. We note also that petitioner appeared voluntarily before the grand jury, in response to an invitation.

Obviously, then, there is no reason to invoke this Court's supervisory power to reverse petitioner's convictions on Counts VI–VIII. That power is one which "must be sparingly exercised," and its application "where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted." *Lopez* v. *United States, supra,* 373 U.S. at 440. See also *United States* v. *Jones, supra,* 433 F. 2d at 1181–1182.

2. Petitioner contends that the court of appeals erred in distinguishing perjury Counts IV and V from Counts VI–VIII with regard to the effect of inadmissible evidence upon the jury's deliberations. The

court below pointed out (Pet. App. B, p. 22a) that to find petitioner guilty of perjury in his denial of the 1965 meeting in Atlanta and his receipt of a $25,000 payment at that meeting (Counts IV and V), it was necessary to consider the same evidence required for convictions on Counts I–III, offenses which the court found were proved by evidence of legislative acts.

While it is our position that petitioner's conviction on all counts was properly obtained without the use of evidence protected under the Speech or Debate Clause,[5] we agree with the court below that, in any event, such evidence could have played no significant role in petitioner's conviction on Counts VI–VIII. As the court of appeals noted (Pet. App. B, p. 23a), to convict petitioner on Counts VI–VIII, the jury need only have compared petitioner's grand jury testimony with Cohen's testimony and with the recording of petitioner's January 20 meeting with Cohen. The contradiction between petitioner's two statements and the proof of the falsity of his grand jury testimony were so overwhelming as to preclude any inference other than that of guilt. There was no need for the jury to consider other evidence in the case; thus, the instant case differs in this respect from *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), affirmed, 383 U.S. 169.

We note also that the jury was carefully instructed to distinguish the evidence as to each count:

> A separate crime or offense is charged in each count of the indictment. Each charge and

[5] See our pending petition for a writ of certiorari, No. 72-1529, *United States* v. *Dowdy*, filed May 11, 1973.

> the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged. [Transcript of December 29, 1971, pp. 46–47.]

Under these circumstances, the error, if any, in permitting the jury to consider Counts VI–VIII along with Counts I–V was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24.

3. Petitioner contends that the government's proof at trial violated the "two-witness" rule for perjury prosecutions, since the falsity of the statements which formed the basis for Counts VI–VIII was established by the testimony of only one witness, Nathan Cohen, corroborated by the introduction of the recording of Cohen's conversation with petitioner on January 20, 1970. In petitioner's view, the tape recording represents another unsworn statement by Cohen and cannot therefore be used to corroborate Cohen's in-court testimony (Pet. 16).

It is obvious, however, that petitioner's own words on the tape recording, as well as Cohen's, constitute "corroboration" for Cohen's testimony.[6] As this Court long ago established, it is not necessary for the government to produce two witnesses in court to testify to the perjury; it is sufficient that one witness be corroborated by circumstantial evidence; indeed, in some cases perjury may be proved without any human witness, solely on the strength

[6] Petitioner has not challenged the authenticity or accuracy of the tape recordings.

of the defendant's own provable statements. *United States* v. *Wood,* 14 Pet. 430, 439, 441. The purpose of the "two-witness" rule is to avoid pitting one oath against another without other evidence. *United States* v. *Wood, supra,* 14 Pet. at 437–439, and authorities there cited; *Hammer* v. *United States,* 271 U.S. 620, 627. To be distinguished are situations such as that in the instant case, where the very words of the accused have more probative value in proving the crime than would the testimony of innumerable other witnesses. See *Hammer* v. *United States, supra.* It is difficult to conceive of better corroboration for Cohen's in-court testimony than the words of petitioner, preserved on magnetic tape, making the very statements which he later denied under oath.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys.

AUGUST 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973